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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-853

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORPORATION,

Petitioners,

vs.

FORTNER ENTERPRISES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONERS

MACDONALD FLINN
14 Wall Street
New York, New York 10005

ALBERT F. REUTLINGER
501 South Second Street
Louisville, Kentucky 40202

WILLIAM H. BUCHANAN
600 Grant Street
Pittsburgh, Pennsylvania 15230

Attorneys for Petitioners

Of Counsel:
WHITE & CASE
NORMAN YOERG, JR.
MIDDLETON, REUTLINGER & BAIRD

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals in 1971 (A 1369[1]), when it reversed a verdict directed for respondent and remanded for a new trial on the question of liability, is

1. "A" references are to pages of the Appendix filed with this Court pursuant to Rule 36. Cited material not included there is referred to by identification of the 1970 trial transcript (volume and page). Throughout this brief, all emphasis in quoted passages has been added unless otherwise noted.

reported at 452 F.2d 1095. The opinion (consisting of findings of fact and conclusions of law) of the District Court for the Western District of Kentucky following the new trial has not been reported but appears at A 1569. The second opinion of the Court of Appeals (A 1760), rendered in 1975 in affirming the judgment (A 1753) entered against petitioners after the new trial, is reported at 523 F.2d 961.

Jurisdiction

The final judgment of the Court of Appeals was entered on October 3, 1975 (A 1771). The petition for a writ of certiorari was filed on December 18, 1975. It was granted on February 23, 1976. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Is a *prima facie* case of the economic power requisite to a *per se* tying violation of Section 1 of the Sherman Act proved by evidence consisting solely of

(a) ancillary financing by a supplier on allegedly cheaper, more favorable terms than available elsewhere,

(b) conditioned upon the purchase of a tied product, assertedly at a "non-competitive higher price," and

(c) "customer acceptance of the tie-in,"

particularly where, as the Court of Appeals concluded, there is a failure "to show that other lending institutions were prevented from offering a loan on equally favorable

terms" (*i.e.*, neither legal barriers nor higher costs barred competing lenders from profitably extending credit on such terms) and "soon after [the allegedly uniquely favorable financing was negotiated] • • • traditional lending agencies in Louisville indeed began offering loans upon the same basis," whereas previously they had not "only because of their unwillingness to take the risk involved?"[2]

2. In the same circumstances, is a *prima facie* case of a conspiracy between the supplier and its credit subsidiary to monopolize in violation of Section 2 of the Sherman Act (including the requisite specific intent to achieve monopoly or the dangerous probability of doing so), proved where, *inter alia,*

(a) the record contains no evidence that the challenged financing was offered on predatory, below-cost terms and the uncontradicted evidence is that other lenders were able and stimulated to give equally favorable terms;

(b) the record contains no evidence that the challenged financing was conditioned upon exclusive dealing and the uncontradicted evidence is that even the credit granted could be refinanced to allow the purchase of competing products; and

(c) the record contains no evidence that the supplier's competitors were foreclosed because of the challenged financing and the uncontradicted evidence is that, while total sales nationally and those of competitors with larger sales increased, the supplier's sales declined from 1.4% to .8% of the total?

2. The quoted language is from the opinions of the Court of Appeals (A 1380, 1767-68).

Statutes Involved

The applicable statutes are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. They provide in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •."
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor • • •."

Statement

A. Prior Proceedings

This treble damage antitrust action is brought under Section 4 of the Clayton Act (15 U.S.C. §15). Respondent, Fortner Enterprises, Inc., alleges that petitioners, United States Steel Corporation and its wholly-owned subsidiary, U. S. Steel Homes Credit Corporation, forced Fortner to purchase prefabricated houses from U. S. Steel's Homes Division as a condition to obtaining financing for the acquisition and development of the land upon which the houses were to be erected. (A 38-76, 103-32)

Fortner claims that this land financing was uniquely advantageous in that equally favorable or cheap terms (*i.e.*, loans equivalent to 100% of the cost to Fortner of acquiring

and developing the land) were unavailable at the time from other lenders in Louisville, Kentucky. Such a "tying arrangement," Fortner argues, constitutes a *per se* violation of Section 1 of the Sherman Act. Fortner also urges that the arrangement was a conspiracy to monopolize in violation of Section 2.

The District Court originally granted summary judgment dismissing the complaint (293 F. Supp. 762), and the Court of Appeals affirmed without opinion (404 F.2d 936). This Court granted certiorari and held, in a five-to-four decision, that Fortner was entitled to a trial of its claims (No. 306, Oct. Term, 1968; 394 U.S. 495). Following a full trial, the District Court directed a verdict for Fortner on the question of liability, submitting only the damage issues to the jury. Instructed that single damages could not exceed $250,000, the jury returned a verdict of $93,200 before trebling, to which attorney's fees were then added in the judgment entered by the trial court. (A 196-99, 1016-58, 1063-72, 1072-77)

Petitioners limited their appeal from that judgment to the liability issues, contending that respondent had failed to prove a *prima facie* case of any Sherman Act violation and, alternatively, that it was error to direct a verdict for respondent. The Court of Appeals, in its 1971 decision, held that respondent had "made out a *prima facie* case of Sherman Act violations," but it reversed the directed verdict and remanded for a new trial solely on the issues of violation of Sections 1 and 2 (A 1368, 1372). Petitioners unsuccessfully sought certiorari on the ground that no *prima facie* case of any Sherman Act violation had been established. (No. 71-1172; 406 U.S. 919)

At the new trial, Fortner offered to waive the jury, and petitioners acquiesced. Supplemental evidence was introduced, and the record includes that evidence as well as the evidence from the first trial. The trial judge signed a photocopy of Fortner's proposed findings and conclusions, and entered a judgment that petitioners had violated Sections 1 and 2. (A 1412-47, 1569-1604, 1753)

From that final judgment petitioners again appealed. Although the trial judge, on the same findings of fact from which he concluded that there was a *per se* tying violation of Section 1, also concluded that petitioners had conspired to monopolize in violation of Section 2 (A 1603-04, 1753-54), the Court of Appeals limited its affirmance to the *per se* tying violation, holding that because "the district court correctly found that a violation of Section 1 was established, it is unnecessary to consider whether the finding of a violation under Section 2 may also be upheld." (A 1770)

B. The Facts of Record

Most of the facts of record relevant to the issues of liability are undisputed. Indeed, petitioners believe that all the evidence material to those issues with respect to the events and circumstances portrayed in the testimony and exhibits is uncontradicted.[3]

3. The great bulk of the evidence consists of testimony by Fortner's witnesses and pre-litigation contemporaneous documents introduced by Fortner. Unless otherwise noted, all the evidence cited in this statement is of that source and, regardless of source, to the best of petitioners' ability the state of the record as described here and in the argument section of this brief is uncontradicted by any other evidence. The trial court did not reject any testimony upon which petitioners rely, either on grounds of credibility or otherwise. For purposes of review, petitioners do not question the credibility of Fortner's witnesses but instead accept the primary facts to which they testified (as opposed to any expert opinion testimony).

The Parties and Their Businesses. U. S. Steel's Homes Division manufactures prefabricated houses, selling them through franchised dealer-builders such as Fortner. Its subsidiary, the Credit Corporation, was formed in 1954 for the several purposes (as shown by internal documents and the testimony of its president) of furnishing financial assistance solely to Homes Division customers unable to obtain the same assistance from local commercial banks, competing with other prefabricators providing such assistance, and of earning a profit. Initially the Credit Corporation's activities were limited to financing the purchase and construction of the houses. Later, to meet such assistance by other prefabricators, its financing was extended in some instances to the acquisition and development of land for Homes Division houses. From its inception, the Credit Corporation's financing has always been a "tool" intended to assist the Homes Division's house sales. (A 897, 900-01, 953, 955-62, 968, 1085-86, 1088-90)

Beginning in 1958, in certain instances the Credit Corporation offered higher risk "special" land financing to selected dealers "without conformity [to] conventional or conservative patterns but within the bounds of prudent business judgment" to attain minimum distribution levels (*e.g.*, a target of 1800 houses in 1959). In specified circumstances, the Homes Division guaranteed these special land loans to protect the Credit Corporation against loss. The testimony of the Credit Corporation's vice president that the special land financing was responsive to competition requiring the acceptance of greater risks by prefabricators and others is uncontradicted. Fortner's land financing, which is the subject of its antitrust claims, was in the special category guaranteed by the Homes Division. (A 800-

01, 898-99, 974-77, 980-82, 1095-98, 1268-74, 1398) The record does not show the terms on which any dealer other than Fortner was financed by the Credit Corporation, whether in its regular or special land financing categories.

The Credit Corporation's financial statements and its president's testimony show that, through 1961, U. S. Steel invested $1 million in its stock and loaned it another $1 million against which it borrowed up to $13 million from commercial banks. The prime rate was obtained because U. S. Steel stood behind the indebtedness of its subsidiary. At the end of 1960 and 1961, respectively, the Credit Corporation had loans outstanding of approximately $15 million and $14 million. Of these totals, $5,372,000 and $5,918,000 were for land financing, including loans in both the regular and special categories. (A 957, 962-66, 982-83, 1345-55)

As its records show, the Homes Division sold a total of 1,793 houses in 1960 for $6,746,353 and 1,342 houses in 1961 for $5,051,992. Petitioners introduced uncontradicted evidence that, by comparison, the largest competing prefabricated house manufacturers sold the following number of houses:

Year	*National Homes*	*Swift Industries*	*Inland Homes*	*Kingsbury Homes*
1960	16,804	2,500	2,281	1,401
1961	18,276	3,000	2,253	2,150

In addition to the fact that the Homes Division had been losing and continued to lose sales while its major competitors' volume increased, the total prefab houses built were 126,867 in 1960 and 156,004 in 1961. Thus the approximate

share of the Homes Division declined from 1.4% to .8%. Prior to the arrangements with Fortner in 1960 and 1961, the Homes Division's sales in Louisville were 13 houses at $60,178 in 1957, 2 houses at $12,261 in 1958, and none in 1959. Annually, without exception, the Homes Division realized losses far greater than the Credit Corporation's modest profits. In 1960 and 1961, its losses were $627,727, compared with the Credit Corporation's profit of $111,250. (A 884-85, 1199-1200, 1345-55, 1734-35, 1745)

Respondent is owned by Mr. A. B. Fortner, a well-known, successful real estate operator in Louisville. Although respondent had not engaged in realty development prior to the transaction at issue (it had been inactive and had a deficit of $16,000), Mr. Fortner and his personnel had considerable experience in real estate development of the type which is the subject of this lawsuit. In 1959, through Iroquois Development, Inc., in which he owned a 50% interest, he had available certain land in a subdivision in Jefferson County known as Golden Meadows. Part of that subdivision had been fully developed and sold to builders who had erected some 250 houses there. Another part had been developed with the laying of streets and installation of utility connections. The balance was still undeveloped. (A 206-11, 222, 1227, 1231, 1332-35, 1573)

The Transactions and Related Chronology of Events. Mr. Fortner testified his first contact with petitioners came through his salesman, who had heard desirable financing was available and arranged a meeting in the fall of 1959 after Mr. Fortner expressed interest. Negotiations extended over essentially a year and included a variety of proposals, modifications and demands by Mr. Fortner at

successive stages. As petitioners' uncontradicted contemporaneous records show, there had been several meetings before the end of 1959. Mr. Fortner first proposed to transfer from Iroquois to respondent 99 lots with an equity of $56,000, debt of another $56,000 and a projected development cost of $96,000. He asked for $152,000 financing with his contribution to be the equity of $56,000, or 25% of the value of the lots as security. By this time he and his associates had attended a Homes Division seminar, had visited its plant, and were assembling cost figures on the construction of its houses. (A 211-12, 302-03, 306-07, 931, 1332-35)

One of Fortner's exhibits shows that on January 6, 1960 Mr. Fortner "completely changed his proposal as originally made" and "indicated that the only way he would proceed in this undertaking would be on the following basis": the Credit Corporation would finance the acquisition from Iroquois of 155 undeveloped lots at $1,100 per lot, or $170,500, plus their development at a cost of $139,500, while Mr. Fortner's equity contribution was to be an additional 31 fully developed lots worth $62,000. As far as the Credit Corporation was concerned, this proposal by Mr. Fortner was to be "contingent upon a prior determination by him that [the Homes Division] houses can be profitably built * * *." (A 1230-31)

As recorded in another of Fortner's exhibits and Mr. Fortner's testimony, he, his attorney and his advisor, Mr. Edward Horn of Louisville Mortgage Service Company, were well satisfied with draft documents prepared in February 1960 by the Homes Division to implement the basic terms proposed by Mr. Fortner. The question of the maturity of the loan, however, "seemed to result in an im-

passe." Based on petitioners' standard practice, the financing offered was limited to a one year program. Although he testified that he had been connected with another project where 519 houses had been built in one year, Mr. Fortner was "unwilling to enter into [the project with petitioners] unless he [could] have a two year program." He also rejected "the possibility of reducing the loan by cutting back the number of lots * * *." (A 207-08, 217, 1233-34)

Another of Fortner's exhibits establishes that by March, 1960, negotiations had reached a point where Mr. Fortner was expressing interest only in an arrangement along these lines:

> "Fortner to contribute 31 completely developed lots, U. S. Steel Homes Credit Corporation to provide money to buy 155 undeveloped lots and lend development money to immediately develop 16 out of this 155. Upon attaining 50 percent prior sales of the 47 developed lots, the Credit Corporation would then be obligated to furnish development money for the balance of the entire plot at one time." (A 1232)

Mr. Fortner summarized the events to this point as having involved "lots" of meetings where "we made offers backward and forward to each other until, uh, I asked 'em for a certain amount which, uh, if we could of got was real good to go on with the deal and get it over with. * * * [W]hen they come to our terms, why, we told 'em we would make a deal if we could and they agreed to do it." (A 212-213, 308-13)

There followed a hiatus when Mr. Fortner's partner in Iroquois decided he would prefer to assume Mr. Fortner's

interest. By September, 1960, however, the partner agreed to sell, and Mr. Fortner reactivated his application with the petitioners. He wrote to the Homes Division, stating: "After visiting your plant and viewing your 1961 models, I am more convinced than ever that we can develop a very successful and mutually profitable program in Golden Meadows. We have 31 lots, fully developed, with FHA commitments in hand on your models." (A1228-30, 1573-74)

On October 28, 1960, Fortner and the Credit Corporation executed their first loan agreement and related documents. Fortner agreed to develop the undeveloped lots and to erect on each of the 186 lots (developed and undeveloped) a Homes Division house. This 1960 agreement obligated the Credit Corporation to a land loan of $309,645 after deduction of a service fee of more than 3% ($170,500 initially and thereafter progress payments as development work was accomplished). (A 44-74, 1239, 1259) No guaranty was required of Mr. Fortner or any of his corporations.

Mr. Fortner and others associated with respondent testified that they experienced difficulty with the houses from the beginning, including omission of parts and delivery of defective parts necessitating additional work (these witnesses admitted that homeowner complaints were also based upon faults attributable to Fortner's construction work). Mr. Fortner testified that the full extent of these problems was not known when he requested financing to acquire an additional 32 fully developed lots. The Credit Corporation agreed to a second land loan in the amount of $56,688 (after deduction of a 4% service fee) on August 2, 1961. By that time Fortner had contracts for the sale of 33 houses to homeowners, at least a dozen of which had been completed

and sold and another 14 of which were under construction. (A 106-34, 233-39, 287, 490-538, 1112-28, 1213-16, 1404-05)

Mr. Fortner testified that respondent ran out of cash because of the defects and delays which impeded completion of houses, thereby making sales at the projected rate impossible and ultimately giving his subdivision a bad reputation. His testimony and one of Fortner's exhibits, as well as the testimony of a Credit Corporation representative who attended a June 5, 1962 meeting[4] of the parties, establish that Mr. Fortner there asked to use the petitioners' financing for other houses. The evidence is uncontradicted that petitioners, while refusing to acquiesce in the use of their money to build other houses, told Mr. Fortner he was free to refinance and build any other houses upon paying off the loans owing to the Credit Corporation. At this point in the meeting, his attorneys declared that no further purpose could be served by negotiation and they "would see [the petitioners] in court." (A 260-63, 995, 1261-62, 1389-93; 1970 Tr., Vol. XIII, p. 57)

Pursuant to the challenged financing arrangements, Fortner's total purchases from the Homes Division were 4 houses in 1960 for $14,723; 55 houses in 1961 for $189,002, and 13 houses in 1962 for $43,413. Mr. Fortner testified that respondent would not have purchased these houses without the financing obtained from the Credit Corporation. During this time, however, on its own initiative Fortner bought

4. Previously, Fortner's exhibits show, Homes Division representatives expressed the intention to eliminate any remaining product problems Fortner might assert and undertake an equitable settlement, but they were unsuccessful in obtaining a requested list of specific claims from respondent. (A 1107-11, 1260, 1267; see also 1970 Transcript, Vol. XIII, pp. 55-57)

four Homes Division houses financed not by the petitioners but with financing obtained locally in Louisville. (A227, 1116, 1200, 1215, 1242-43)

In addition to respondent's purchase of these four houses without financing by petitioners, there is substantial other evidence consisting of Mr. Fortner's own statements as to the attractiveness of the Homes Division houses and his ability to underprice them in comparison with competing houses (including his statement as late as January 1962 that anyone comparing his major competitor's house "will agree that we have the superior home for [$475] less money"). At the trial, however, Fortner's superintendent, Mr. Miles, based upon his comparison after suit was filed of an invoice for the highest-priced Homes Division model purchased by Fortner, testified that in his opinion the petitioners' houses cost $455 more than a comparable conventional house. (A 217, 235, 267-68, 412, 547, 549, 603, 630-41, 654-97, 1107, 1116, 1229, 1318, 1388-90)

As previously indicated, Fortner contends that both of the Credit Corporation's land loan commitments were on uniquely favorable terms in that they amounted to 100% of the cost to respondent of acquiring and developing the 219 lots which secured the transactions. Mr. Fortner and other witnesses called by respondent testified that to their knowledge "100%" land loans were not then available from conventional lending sources in Louisville. For example, Mr. Horn, Mr. Fortner's advisor and president of the largest mortgage company in Louisville, so testified. The evidence, including Mr. Horn's testimony, however, is undisputed that by at least July, 1962, his company, other

mortgage companies and building and loan associations in Louisville, responding to what competing prefab manufacturers had offered and what the Credit Corporation allegedly offered, were making 100% land loans. (A 421-22, 429-30, 821-23, 839-44, 847, 868-69, 1661-62)

Summary of Argument

When it first reviewed this case, this Court emphasized that the money or credit which comprises financing is a fungible commodity. A loan, therefore, can be unique only to the extent that it is offered by one lender on cheaper or more favorable and attractive terms than offered by other lenders. The Court rejected Fortner's contention that offering more favorable terms than are available from others proves that the lender has the economic power over credit essential to establishing a *per se* tying violation of the Sherman Act where the loan is conditioned upon the purchase of other goods.

Instead, the Court held, because uniqueness confers economic power only when competitors are unable to offer the same product or to offer it profitably, the requisite power over credit or competitive advantage could be established only by proving that other lenders were prevented from granting equally cheap or favorable loans either (a) because legally barred from doing so or (b) because petitioners enjoyed a unique cost advantage which precluded others from offering equivalent terms at a profit. Absent such proof of economic power over credit, the Court declared, more favorable loan terms simply evidence legitimate price competition in the tied product, the houses.

As the Court of Appeals concluded, the trial record shows that Fortner failed to prove that either legal prohibitions or any cost advantage enjoyed by petitioners prevented or disabled other lenders from offering 100% land financing, which Fortner claims was unique because merely *unavailable* at the particular time. It is uncontested, however, that shortly after Fortner negotiated its loans traditional lenders were stimulated to make 100% loans. Moreover, the lower courts found that such conventional financing sources previously had not made such loans only because of their unwillingness to take the risk of lower profits.

In finding, nevertheless, that petitioners had "sufficient economic power" over credit to restrain trade in the tied product, the courts below misconceived this Court's mandate. They erroneously concluded that evidence of (a) more favorable loan terms than then available elsewhere, (b) an allegedly non-competitive higher price for the tied product, and (c) acceptance by customers of such a tie-in proved economic power despite Fortner's failure to prove the legal barriers or cost advantage "suggested by the Supreme Court."

Loan terms uniquely favorable because not available elsewhere are not evidence that a lender has a *unique ability* to offer such terms, because that lender—even though enjoying no more than the normal profit realized by competitors in the tying or credit market—may merely have opted to reduce the price of his tying product to promote the sale of his tied product, in effect reducing its price and thus competing in the tied market.

Similarly, even valid proof of a higher price for the tied product, knowingly agreed to, and acceptance of such

a tying condition by customers (whether few or many) is not evidence of economic power over credit. A fungible commodity, such as credit, unique only because offered at a lower price, will invariably attract buyers because of that lower price. They will not accept the higher priced tied product, however, unless—balancing the burden of the tie against the saving on the fungible tying element—they conclude that the saving compensates for the burden of accepting the more expensive tied product. Neither proof of a higher price for the tied product nor of customer acceptance, therefore, is evidence of economic power over a non-distinctive tying element, such as credit, which is offered at a more favorable price. Instead, those elements are at most evidence that the credit is in fact offered on cheaper or more favorable terms, and, as this Court held, uniquely favorable terms can not prove economic power.

Finally, in disregarding the fact that conventional lenders, earlier unwilling to risk lower profits, were stimulated to offer 100% land loans, the lower courts totally ignored the issue mandated by this Court, which held that the requisite economic power over credit could be shown only by proof that other lenders were unable to offer such financing profitably because legally prevented or economically barred in consequence of a unique cost advantage enjoyed by petitioners.

The record also establishes Fortner's failure to make a *prima facie* case of any conspiracy to monopolize. The tie-in is the crux of this claim, too, and the failure as a matter of law to prove the requisite economic power for a *per se* violation of Section 1 not only requires meeting the more demanding rule-of-reason standard but precludes finding

a violation of Section 2 on the same evidence, as the trial court did, since tying arrangements are illegal only where power over the tying element can distort competition in the tied product market.

Dealer financing is a widespread and legitimate competitive activity. It was not used by petitioners to obtain exclusive dealing commitments, it was not offered on predatory, below-cost terms, and it is not shown in any other way to have been commercially objectionable or of that exclusionary impact, lacking economic justification, from which any step directed to creating monopoly power could be inferred. Instead, the record shows that, while petitioners' share of prefabricated house sales declined from a miniscule 1.4% to an insignificant .8%, other lenders were able and stimulated to offer the same loan terms. In short, neither the specific intent to gain a monopoly and destroy competition with the dangerous probability of doing so nor any other element required to establish a *prima facie* case of conspiracy to monopolize can be gleaned from the evidence of record here.

ARGUMENT

I

Fortner Failed to Prove a *Prima Facie* Case of the Economic Power Over Credit Essential to Establish That the Land Financing It Negotiated, Which Was Conditioned Upon the Purchase of U.S. Steel's Prefabricated Houses, Was a *Per Se* Tying Violation of the Sherman Act.

A. This Court Held That Economic Power Requires Proof That Competing Lenders Were Prevented From Offering Equally Favorable, Cheap Financing Profitably Because Petitioners Had a Unique Cost Advantage or Because of Legal Barriers.

When this Court determined that summary judgment for petitioners was improper and that Fortner was entitled to a trial of its claims, the standard of "sufficient economic power" essential to the *per se* tying rule in a Sherman Act case was carefully analyzed in the majority opinion by Justice Black both in general terms and in relation to the specific claim asserted in this case. Dealing first with the situation where the tying product itself is unique, that opinion reiterated the teaching of *United States* v. *Loew's Inc.*, 371 U.S. 38, 45 (1962), which held that "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (394 U.S. at 503)

Specifying some degree of "appreciable economic power" over the tying element as necessary, however, the majority equated the requisite power with that enjoyed by the seller of a product sufficiently unique and desirable to force

an "appreciable number of buyers" to accept a "higher price because of their stronger preferences for the product."[5] Rather than compelling those buyers to accept a premium price yielding higher than normal profits, Justice Black explained, such a seller can choose instead to force them to accept a tying arrangement, thereby foregoing his abnormal profits in the tying market to distort or "prevent free competition for their patronage in the market for the tied product." A seller shown to have the freedom from the full forces of competition in the tying market to choose between those two alternatives has "sufficient economic power" to invoke the *per se* tying rule.[6]

5. The seller who can thus successfully differentiate or distinguish his product from competing goods achieves the ability to vary his price, as he alone determines, through at least a narrow range of profitable alternatives, unlike the seller whose product is not so insulated from the full impact of competition and who must sell at the price dictated by the market. Uniqueness or product differentiation, real or in the minds of buyers, sufficient to command a premium price yielding higher than normal profits may exist because of distinctiveness in intrinsic attributes, patents, copyrights, advertising and promotion or other distinguishing factors which competitors are unable to reproduce or offer.

6. "Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices. Even a complete monopolist can seldom raise his price without losing some sales; many buyers will cease to buy the product, or buy less, as the price rises. Market power is therefore a source of serious concern for essentially the same reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of *appreciable economic power*. In both instances despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—*can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product*. Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." (*Id.* at 503-504)

This Court recognized, however, that the tying element in this case—money or credit—is not unique or distinctive in and of itself. Rather it is the most fungible of all commodities.[7] No borrower, therefore, will pay to any lender a higher price or accept less attractive terms than other lenders offer. Consequently, Justice Black dealt with the "somewhat confusing" case where the tying product itself is *not* unique or distinctive and sufficiently desirable to command a premium price. (*Id.* at 505, n.2)

First, he rejected Fortner's argument "that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" Justice Black and the majority considered such "claims of uniqueness" together with Fortner's allegations that it and other buyers accepted "a tying arrangement obligating them to buy a tied product at a price higher than the going market rate." Contrary to Fortner's contentions thereafter in the courts below, the majority of this Court did *not* conclude that such evidence would prove the requisite economic power. Instead, the majority held only that —"read in the light most favorable to" Fortner because "summary judgment in antitrust cases is disfavored"— Fortner's allegations sufficiently "raised questions of fact" to entitle it to a trial of the economic power issue in that those claims "may suggest," "can reflect" or are not in-

7. Justice Black stated that "money is a fungible commodity—like wheat * * *." (*Id.* at 509) Justice White asserted that "money [is] the most fungible item of trade since it is by definition an economic counter * * *. The [tying] market here is money, a completely fungible item." (*Id.* at 515, 519)

consistent with "the possibility of market power over borrowers in the credit market * * *."[8] (*Id.* at 500, 504-506)

Second, because financing can be unique only in the sense that one loan can be offered on cheaper or more favorable terms than other loans,[9] Justice Black focused squarely upon what is necessary to prove "that uniquely and unusually advantageous terms" are in fact the result of "a creditor's unique economic advantages over his competi-

8. While differing on summary judgment principles as to whether the necessary supplemental evidence was offered by Fortner, the dissenting Justices agreed that proof of uniquely favorable terms does not prove economic power over credit: "[I]f * * * U.S. Steel was simply offering credit at a lower price, in terms of risk of loss, repayment terms, and interest rate, surely this does not establish that U.S. Steel had market power by any measure in the money market. There was nothing unique about U.S. Steel's money except its low cost to [Fortner]. A low price on a product is ordinarily no reflection of market power. It proves neither the existence of such power nor its absence, although absence of power may be the more reasonable inference. One who has such power benefits from it precisely because it allows him to raise prices, not lower them, and ordinarily he does so * * *. I agree with the majority that the affidavits are not *inconsistent* with a 'possibility of market power' and that such power might be shown by showing certain kinds of 'unique economic ability.' But I cannot see how [Fortner] offers to prove this * * *. Promotional tie-ins effected by underpricing the tying product do not themselves prove there is any market power to exercise in that product market, * * *. Cutting prices in the credit market is more likely to reflect a competitive attempt to offset the market power of others in the tied product than it is to reflect existing market power in the credit market. Those with real power do not offer uniquely advantageous deals to their customers; they raise prices * * *. [Fortner's] allegations that U.S. Steel lowered its price of credit [are not] sufficient to establish market power in credit and I can find no offer by [Fortner] of the necessary supplementary proof." (*Id.* at 514-516, 518-520) (emphasis in original)

9. See 394 U.S. at 504 ("* * * no such financing was available to his corporation on any such cheap terms from any other source * * *"); *id.* at 505 ("They could well mean that U.S. Steel's subsidiary Credit Corp. had a unique economic ability to provide 100% financing at cheap rates"); *id.* at 515 ("There was nothing unique about U.S. Steel's money except its low cost to [Fortner]").

tors." Unlike the tying product which is unique or distinctive and sufficiently desirable to command a premium price, where the tying element is the fungible commodity of credit or money and legal prohibitions do not prevent others from offering the same or equally favorable terms, Justice Black explained that a lender can have the requisite economic power only if he enjoys a unique "cost advantage":

> "Uniqueness confers economic power *only* when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e.g., International Salt; Loew's,* or physical, as when the product is land, *e.g., Northern Pacific.* It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it."[10] (*Id.* at 505, n.2)

10. Earlier, in *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 6-7 (1958), Justice Black had pointed out that where a tying product is undifferentiated or fungible the seller is unlikely to have sufficient economic power to restrain trade in the market for the tied product: "As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." Using Justice Black's example, however, even a seller of such a fungible commodity would have economic power if flour were selling at $10 a barrel and its cost to all other sellers was $9 a barrel but the one seller had a unique cost advantage which saved him $1 per barrel. Then the seller with this unique cost advantage could reduce his price to $9 a barrel, still earn a normal profit and, to the extent that he could supply the demand, at the same time preclude his competitors from matching his price unless they were to forego all profit.

A cost advantage over competitors would give a lender higher than normal profits (like those earned by the seller of a distinctive product which commands a premium price). Alternatively, he could use this advantage or economic power in the credit market to induce acceptance of a tie-in by reducing his "price" (*i.e.*, offering more favorable loan terms) to a level at which competitors could not profitably lend, thereby distorting competition on the merits in the tied product market. Consequently, this Court held, economic power over the tying element could be established in this case only by proof that other lenders were prevented from offering equally favorable financing either because (1) legally barred from doing so or (2) economically barred in that the petitioners enjoyed a unique cost advantage which prevented other lenders from profitably offering such terms.

Thus the crucial inquiry mandated by this Court is not whether comparable financing was *available* at the time from competitors. Even if the land financing negotiated by Fortner was "uniquely advantageous" in that equally favorable or cheap terms were not then available from traditional Louisville lending sources, in the language of Justice Black's opinion the issue is whether the "Credit Corporation had a *unique economic ability* to provide 100% financing at cheap rates" in that competing lenders were precluded by law from offering such terms or "could not profitably lend money on the risks involved" because petitioners had "achieved economies of scale in their credit operations." (*Id.* at 505-506, 509) Unless other lenders were shown to be unable to match the cheap or attractive terms of Fortner's loans, then petitioners could not have the requisite economic power.

Absent such proof of economic power, Justice Black and the majority stated that "advantageous credit terms may be viewed as a form of price competition in the tied product." A seller can legitimately achieve such price reduction for the tied product, they said, as long as the cheaper tying element he offers consists of ancillary benefits "over which he has no economic power."[11] (*Id.* at 508) They concluded:

> "It may also be, of course, that these allegations [disclosing the possibility of market power] will not be sustained when the case goes to trial. It may turn out that the arrangement involved here serves legitimate business purposes and that U.S. Steel's subsidiary does not have a competitive advantage in the credit market." (*Id.* at 506)

B. As the Court of Appeals Found, the Record Fails to Prove That Either Legal Barriers or Any Cost Advantage Prevented Other Lenders From Making Loans on Equally Favorable Terms.

Fortner's proof fails to meet either of the requirements set forth by Justice Black and the majority of this Court as essential to establish sufficient economic power over credit.

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11. Justice White, for the dissenters, agreed: "* * * [T]he low price of credit is functionally equivalent to a reduction in the price of the houses sold. * * * Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller in effect is merely competing in the tied product market." (*Id.* at 515, 518)

1. Many Lenders Were Legally Free to Make 100% Land Loans and No Lenders Were Legally Barred From Offering Equally Cheap or Favorable Financing by Varying Other Terms of Their Loans.

Following the second trial, the Court of Appeals found that the evidence failed to show that legal barriers prevented other lenders from making loans on terms as favorable as those negotiated by Fortner:

> "While the court below took notice that national banks and federal savings and loan associations were legally prohibited from making 100% loans, there was no similar evidence as to the many other types of lending institutions. Nor was there evidence that any lender was prohibited from varying other terms of loans[12] so as to offer equally favorable financing." (A 1768)

Thus the Credit Corporation's ability to extend 100% land financing was in no way unique in the sense that only it could lawfully offer loans on those or equally favorable terms. As the Court of Appeals concluded, many other lenders could, too. In fact, as the court also concluded, soon after Fortner negotiated its financing "traditional lending agencies in Louisville indeed began offering loans upon the same basis." (A 1380)

12. *I.e.*, the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. (A 1381)

2. There Is No Evidence That Petitioners Had Any Cost Advantage Preventing Others From Offering Equally Favorable Financing and Conventional Lenders, Merely Unwilling to Risk Lower Profits Previously, Were Stimulated to Offer 100% Loans Shortly After Fortner's Financing.

Absent proof of any legal barrier to competing lenders' making comparable loans, the paramount issue in Fortner's *per se* tying claim, as defined by this Court's mandate, is whether the Credit Corporation had some cost advantage or economy of scale which precluded other lenders from offering credit profitably on the same or equally favorable terms.

In its first opinion the Court of Appeals found that "there is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation."[13] (A 1382) No further evidence as to the relative costs or profitability of the Credit Corporation and other lenders was introduced at the new trial. In its second opinion, the Court of Appeals concluded that "the trial court failed to make any findings

13. To the contrary, the sole evidence of record is that the Credit Corporation operated at a cost disadvantage and with a lower rate of profit in comparison with traditional lending institutions. (See A 1501-12 for detailed references to the evidence) For example, the Credit Corporation borrowed its funds at the prime rate or above. Its costs of acquiring the money it loaned were higher, therefore, than those incurred by commercial banks, savings banks and other lenders which obtain their funds at no cost or at less than the prime rate. To illustrate, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356 (1963), this Court found that commercial banks "enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. * * * The reason for the competitive disadvantage of most lending institutions *vis-a-vis* banks is that only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, by virtue of their unique power to accept demand deposits."

on this issue and [Fortner] does not contend on appeal that a cost advantage was established." Instead, as the Court of Appeals noted, the trial judge's findings (A 1601) were that "other lending institutions were not making such high percentage loans only because of their unwillingness to take the risk involved." (A 1768)

In summary, the lack of any evidence that other lenders were unable profitably to offer 100% land financing at any time is destructive of Fortner's claims that petitioners had economic power over credit.[14] Instead it is inconceivable that the traditional lending agencies, stimulated to make 100% loans soon after the financing of Fortner and thereafter, would have done so without making a profit. Not

14. Lower courts other than the Court of Appeals here have recognized that this Court's mandate in this case makes such a failure of proof fatal to any *per se* tying claim where credit or financing is the tying element. The Third Circuit, in *Anderson* v. *Home Style Stores, Inc.*, 381 F. Supp. 402 (E.D. Pa. 1974), *aff'd w/o opinion*, 511 F.2d 1392 (3rd Cir. 1975), affirmed a directed verdict dismissing such a claim at the end of the plaintiffs' case where the trial court had concluded: "There is no question in this case of any legal or physical inability on the part of other lenders in the credit market to offer loans to plaintiffs in the amounts required to go into business; therefore, the only remaining area in which defendants could have an advantage of their competitors is economic, *i.e.*, where the 'competitors are simply unable to produce the distinctive product profitably * * *' 394 U.S. at 505 * * *. Plaintiffs have utterly failed to show that defendants enjoyed a cost advantage in making their guarantees of plaintiffs' financial arrangements or that defendants' competitors were unable to make equivalent financial arrangements profitably * * *." (381 F. Supp. at 406) Similarly, in *Carlson Companies, Inc.* v. *The Sperry & Hutchinson Co.*, 374 F. Supp. 1080, 1087 (D. Minn. 1973), the court stated: "In *Fortner*, the [Supreme] Court indicated that barriers may result from the inability of competitors to produce the distinctive product profitably and that economic power is conferred 'only when other competitors are in some way prevented from offering the distinctive product themselves.' * * * Thus it becomes apparent that the court in an economic uniqueness case must look to the economic ability of competitors to offer similar programs before an antitrust violation may be found."

only is there no evidence that they failed to profit from their 100% loans, but the record is devoid of any showing that any conventional lenders could not have profitably made such loans at the time Fortner negotiated the financing it subsequently challenged. Rather, as the trial court found, conventional lenders in Louisville were not then making 100% loans simply because they were unwilling to take that degree of risk (A 1601) or, as Fortner conceded in its brief below (p. 39), because they would not take the "chance of the loans not being profitable."

Against this evidentiary background, this Court's opinion and economic logic compel the conclusion that petitioners could not have economic power in a credit market populated by many lenders, legally free to offer the same or equally favorable, cheap loans, because the record fails to prove—indeed, disproves—that petitioners had the cost advantage articulated by Justice Black.[15] Only if petitioners enjoyed

15. See Note, "The Logic of Foreclosure: Tie-In Doctrine After *Fortner* v. *U.S. Steel*," 79 Yale L.J. 86, 97-98 (1969) ("The only thing peculiarly attractive about U.S. Steel's offer was the low price of the tying product compared with the price of an identical product from other sources. * * * The [Supreme Court in *Fortner*] correctly identified the situations where foreclosure can result from a uniquely low price on an otherwise undifferentiated product as those in which the tying seller has some cost advantage over his tying market competitors"); Note, "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 7, 241 (1969) ("Because the money market is composed of many sellers and the product is fungible, the only arguable basis of power in credit is greater efficiency. The greater-than-normal profits test of economic power * * * is the only test helpful in determining the existence of economic power in the tying product in this situation. Therefore, on remand the district court will, despite the difficulty, have to use the profits test"); Dam, "*Fortner Enterprises* v. *United States Steel*: 'Neither a Borrower, Nor a Lender Be,'" 1969 Supreme Court Rev. 1, 27 ("In the absence of a patent or copyright where competitors are 'prevented from offering the distinctive product themselves,' economic uniqueness could only prevent competitors from offering the product if the seller had a 'cost advantage in producing it'").

such a cost advantage could other lenders be prevented from offering equally cheap or favorable financing by their inability to do so profitably.

C. In Finding That Petitioners Had Economic Power Over Credit, the Courts Below Misconstrued This Court's Mandate and Applied Erroneous Legal Standards.

1. The Courts Below Found That Economic Power Over Credit Was Established by Proof Limited Solely to (1) More Favorable Terms Than Available Elsewhere, (2) a Non-Competitive Higher Price for the Tied Product and (3) Customer Acceptance of Such a Tie-In

The trial court, in adopting verbatim Fortner's proposed findings, reached the ultimate conclusion (A 1579) that "the Credit Corporation [had] sufficient economic power over the tying product" and set forth "the evidence which [led] * * * to this conclusion" in its subsequent findings.

First, the trial judge found that the Credit Corporation's financing of Fortner was "unique" in that the terms were more favorable than available elsewhere (*i.e.*, 100% of the cost to Fortner of acquiring and developing the land which secured the loans). (A 1579-89, 1594-96, 1600-01) Second, he found that the Homes Division's prefabricated houses were overpriced by $455 in comparison with a conventional house and that such ability to obtain "a higher price [for the tied product] * * * is again evidence of the Credit Corporation's leverage or economic power." (A 1592, 1601-02) Third, he found that "millions of dollars of loans" made in the special land financing category "contained the tie-in provisions" and concluded that "This is one of the elements of evidence establishing the economic

power or leverage of the Credit Corporation." (A 1589-90, 1601)

The Court of Appeals affirmed the trial court's finding of economic power on the basis of just those three factors. It thereby perpetuated the erroneous assumption of its first opinion (A 1380) that the two barriers to the ability of competing lenders to match petitioners' loan terms specified by Justice Black were not the only possible sources of economic power over credit.

Noting that Fortner "relies heavily on its view that the Credit Corporation loans were uniquely favorable to establish that [petitioners] possessed the requisite economic power in the credit market" (A 1763), the Court of Appeals held that the trial court, "in determining that [petitioners] had sufficient economic power in the credit market," was free to evaluate "the evidence of economic power derived from uniqueness" along with the evidence of higher price for the tied product and customer acceptance of the tie-in. Further, the Court of Appeals held, the requisite economic power could be inferred solely from those three elements "despite the district court's failure to find the factors [legal barriers or cost advantage] suggested by the Supreme Court" and even though Fortner "failed to show that other lending institutions were prevented from offering a loan on equally favorable terms * * *." (A 1767-69)

Petitioners submit that the courts below have misconstrued this Court's mandate as to the proof required to establish economic power over credit, substituting instead incorrect legal standards for determining that issue and thereby drawing erroneous conclusions.

2. *Loan Terms More Favorable Than Available Elsewhere Are Not Evidence of Economic Power Over Credit.*

This Court held that economic power or competitive advantage in the tying or credit market can *not* be established by showing simply that loan terms are uniquely favorable because unavailable elsewhere. It must be shown that the lender has a unique ability to offer such terms because all other lenders are precluded from making equally attractive loans. The majority stated:

> "We do not mean to accept [Fortner's] apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.' "[16] (394 U.S. at 505)

Instead, the majority concluded, "Uniqueness confers economic power *only* when other competitors are in some way prevented from offering" the same product or from offering it profitably on the same terms.[17] (*Id.* at 505, n.2)

16. For the dissenters, Justice White agreed: "There was nothing unique about U.S. Steel's money except its low cost to [Fortner]. A low price on a product is ordinarily no reflection of market power. It proves neither the existence of such power nor its absence, although absence of power may be the more reasonable inference. * * * Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller in effect is merely competing in the tied product market. * * * Promotional tie-ins effected by underpricing the tying product do not themselves prove there is any market power to exercise in that product market, * * *." (*Id.* at 515, 518)

17. *Anderson* v. *Home Style Stores, Inc.*, 381 F. Supp. 402, 406 (E.D. Pa. 1974), *aff'd w/o opinion*, 511 F.2d 1392 (3rd Cir. 1975), rejected the contention that economic power can be inferred from the

(footnote continued on next page)

When a lender or a seller of any other commodity offers it at a lower price conditioned upon the purchase of a tied product, he may simply have elected to forego the normal profit realized by competitors in the tying market as the means of achieving a promotional device to enhance his sales of the tied product (in effect, thereby reducing the price of the tied product). Such promotional tie-ins can be offered wholly apart from the existence of any economic power or advantage over the tying element.

Consequently, as this Court held, the mere fact that uniquely favorable terms are offered (*i.e.*, that such terms are unavailable elsewhere) does not prove or disprove economic power. Instead, more favorable or cheaper terms for the tying element are at most only a threshold inquiry; they merely trigger the question which must be answered, "Are those uniquely favorable terms the result of a unique cost advantage enjoyed by the tying lender which prevents others from profitably offering the same or equally attractive terms?" Contrary to the erroneous determination by the courts below, no economic power can be "derived from uniqueness" consisting solely of more favorable terms, and

uniqueness or desirability of the financing granted: "The *Fortner* case made it clear that uniqueness of the terms of the credit or, as in this case, the credit itself is not enough to make out the requisite economic power. The unavailability of credit elsewhere must reflect legal, physical, or economic barriers which prevent defendants' competitors in the credit market from offering such credit." *Cf., Carlson Companies, Inc.* v. *The Sperry & Hutchinson Co.*, 374 F. Supp. 1080 (D. Minn. 1973), where it was also claimed that financing on uniquely favorable terms unavailable elsewhere and conditioned upon the purchase of services from the defendant constituted a *per se* tying violation of the Sherman Act but where the court concluded that it must be shown that economic barriers prevented competitors from profitably offering such financing.

the fact of uniquely favorable terms is not evidence, pointing one way or the other, from which the issue of economic power over credit can be correctly resolved.[18]

3. *A Higher Price for the Tied Product, the Houses, Is Not Evidence of Economic Power Over Credit.*

As evidence of economic power over credit, the trial court and Court of Appeals erroneously relied upon the opinion testimony of Fortner's construction superintendent that the Homes Division's houses allegedly cost $455 more than conventional houses.[19]

Where the tying product, unlike credit or any other fungible commodity, is itself unique or distinctive, it may

18. The logical inconsistency of inferring economic power because a lender's terms are uniquely favorable or cheaper than offered by others is underlined by the fact that in this case the loan terms, negotiated at length by Mr. Fortner, were proposed and ultimately demanded by him so that, as in *Centanni* v. *T. Smith & Son, Inc.*, 216 F. Supp. 330, 335 (E.D. La. 1963), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963), he was not "in any way coerced" but "was in the position of demanding concessions rather than bowing to conditions dictated by others." As a matter of common sense, no inference of economic power can be reasonably drawn from the fact that more favorable terms were induced in such circumstances.

19. For purposes of review, petitioners need not challenge the opinion of Mr. Miles as to the allegedly higher price. As an evidentiary matter, however, his conclusion was sharply disputed because it was premised upon a comparison of the highest priced Homes Division model (including optional extras) with a hypothetical house which was not in fact comparable. The record is barren of any evidence as to the comparative prices of (a) the 10 to 25 competing prefab sellers supplying the Louisville market or (b) comparable conventional houses. Consequently, there is no basis for determining what in fact was the going market price and whether the Homes Division's houses exceeded the competitive price level in any way. (See A 1519-21 and the evidence detailed there) To the contrary, as noted previously and in the following footnote, Mr. Fortner declared that the Homes Division houses were superior to those of his strongest competitor and that he was able to sell them at a lower price.

be permissible to infer economic power from proof that the buyer, *at the time he accepts the tying condition,* acquiesces in spite of the fact that he does not want the tied product or deems it non-competitive or less desirable in price, quality or otherwise. Here, however, the evidence is not only uncontradicted but substantial, as found in Mr. Fortner's sworn statements and respondent's contemporaneous documents and exhibits, that he was affirmatively attracted to the houses themselves when he negotiated the loans.[20] Neither court below found or even suggested that respond-

20. To illustrate, while he stated that he would not have agreed to buy the 219 houses without the Credit Corporation's financing, Mr. Fortner nevertheless testified that the Homes Division's houses were "attractive to the Plaintiff," that the "models spoke for themselves, which was real attractive * * *," and that "we were just generally sold, without checking around any—to any of the places where they were building 'em, that they were good houses * * *." (A 216-17, 227, 1389-90) In addition, Mr. Fortner, with more than 30 years in the real estate business, testified that he was able to and did underprice the Homes Division houses in comparison with competitive houses, and thereafter he increased his selling price but still undersold his competition. (A 267-68, 412, 603, 1107, 1116, 1388) Not only did Fortner, as noted earlier, seek the second loan agreement to buy more houses some 9 months after the first transaction, but Fortner also bought 4 Homes Division houses financed not by petitioners but with financing obtained locally in Louisville. (A 1116, 1200, 1215, 1242-43) As late as January, 1962 (more than 5 months after the second loan and when respondent had completed 43 of the 70 houses purchased), Mr. Fortner wrote that "Our biggest and nearest competitor, Ben Swindler, has sold well over a hundred homes this past year, and I think everyone that will compare his homes at $11,875 with our [Homes Division] B-1 at $11,400 will agree that we have the superior house for less money." (A 1318) It was not until after this lawsuit was filed that Fortner first concluded that the Homes Division's houses were allegedly overpriced when Mr. Miles for the first time undertook his calculation. (A 630; 1970 Transcript, Vol. III, pp. 77-78) Moreover, it can not be reasonably inferred that all Fortner was seeking was the most favorable credit terms it could obtain. Even a developer without Mr. Fortner's expertise would be concerned with the quality and price of the houses, the tied product, and would not accept them at the time the loans were negotiated unless he believed that he could sell them profitably in competition with other houses.

ent deemed the Homes Division houses unattractive or non-competitive or otherwise found the tie-in burdensome when it negotiated the two loans conditioned upon their purchase. As logic dictates and as the cases show, such facts fail to constitute coercion or any other evidence from which it could be inferred that petitioners had economic power over the tying element, credit.[21]

21. In *American Mfrs. Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 1970 Trade Cases ¶73,110 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972), the plaintiff, Kemper, alleging a *per se* tying violation, claimed that it was forced to take some 30 unwanted TV stations to sponsor a program over 60 stations it did want. The trial court found that plaintiff did not bargain seriously for elimination of the tied stations after initially objecting to them. Like Fortner, Kemper had successfully negotiated a lower price for the tying stations. The trial court found that Kemper had received compensating concessions for the less desirable stations, thus getting "substantially what it bargained for," and therefore had not been "coerced" by any economic power (at pp. 88,371 and 88,374). Even though the tying stations were unique in the sense that they were desirable to Kemper and no competitor could offer them (unlike fungible credit which other lenders can offer on the same terms), as well as in the sense that they were offered at a cheaper price, the Second Circuit affirmed, holding that coercion establishing economic power had not been shown by Kemper's *ex post facto* claim in view of its failure to object more seriously in the negotiation of the agreement. (446 F.2d at 1136) Similarly, in *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658, 666 (2d Cir. 1974), after concluding that economic power was not established by any "uniqueness" of the tying element there, the court held that alternatively the plaintiff must at least establish that he was the unwilling purchaser of an unwanted tied product at the time he entered into the transaction. Proof that "he later changed his mind" and no longer wanted the tied product failed to show that he was influenced by any economic power at the time he made the choice to take the tied product. By contrast, see *United States* v. *Loew's Inc.*, 371 U.S. 38, 40-42 (1962) and *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753, 767-768 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965), where the gravamen of the violations found was the successful pressure applied to customers to accept unwanted or inferior tied products to which they expressly objected *ab initio* and where the tying element was compellingly attractive and unique in and of itself in the sense that no competitor could offer that distinctive product or service.

Moreover, where the tying element is fungible (as is the credit or money in this case) and its only unique aspect is that the tying seller offers it on more favorable or cheaper terms, no inference of economic power can properly be drawn, even if the buyer at the time he accepts the tie-in considers the tied product to be inferior.[22] In those circumstances, the buyer who then deems the tied product non-competitive or less desirable will accept it only because, balancing the burden of the less desirable tied product against the savings on the fungible tying product, he concludes that the saving compensates him for the burden of accepting the tied product and he finds the total package to be attractive.

Thus, where a buyer *knowingly* takes a less desirable tied product to obtain cheaper, more favorable terms on the fungible tying element, that fact may confirm that those terms are uniquely favorable and sufficiently attractive to compensate for the less attractive tied product. Such evidence, however, neither proves nor disproves economic power—power which can exist, as this Court held, only where competitors in the market for the fungible tying product are unable to offer equally cheap or favorable terms because precluded by legal or economic barriers.

If Mr. Fortner had believed the Homes Division houses to be over-priced at the time he accepted the tying condi-

22. Directly in point is *Anderson* v. *Home Style Stores, Inc.*, 381 F. Supp. 402, 405 (E.D. Pa. 1974), *aff'd w/o opinion*, 511 F. 2d 1392 (3rd Cir. 1975), where the Third Circuit affirmed withdrawal from the jury of the plaintiffs' contention that "an inference of economic power [can be drawn] from the fact that plaintiffs or others in plaintiffs' position had been willing to pay a higher than competitive price for the tied product" as a condition to obtaining credit unavailable elsewhere.

tion, he would have accepted that condition only because he concluded that the saving realized on the cheaper or more favorable financing compensated for the allegedly higher price of the houses. The evidence of higher price even in that case, therefore, would be at most evidence that the loan terms were cheaper or more favorable, and that fact is not evidence of economic power any more than is the claimed higher price for the tied product.

4. Acceptance of the Tie-In, Even if by Many Customers, Is Not Evidence of Economic Power Over Credit.

Fortner urged and the trial court erroneously adopted verbatim the findings and conclusion that uniquely favorable financing of Fortner and others (as to whom there is no evidence) induced millions of dollars of house purchases and that this was "one of the elements of evidence establishing the economic power" of the petitioners in the tying market. (A 1578, 1589-90, 1601) In treating customer acceptance of the tie-in as an element of evidence establishing economic power in the credit market, this conclusion is contrary to basic economic analysis and premised upon an improper legal standard. Even if proof of customer inducement by uniquely favorable financing on the broad basis claimed were supported by the record, that would, again, be evidence only that the loan terms were in fact more favorable than available elsewhere, not that competitors were barred from offering equally favorable financing.

Where the tying element is fungible, as credit or money, its only uniqueness can be a lower, more favorable price than available elsewhere. A fungible commodity offered at a lower price will inevitably attract buyers, because no

buyer will knowingly pay a higher price for such a product than is asked by a competing seller. Therefore, where credit is offered at a lower price, acceptance of a tying condition, even by many buyers attracted by that lower price, logically neither proves nor is relevant to proof of power in the credit market.[23] Rather such evidence is at most proof that the terms are in fact cheaper or more favorable than available elsewhere. This Court, however, held that economic power can not be inferred from uniquely favorable, attractive terms but instead requires proof that competing lenders are precluded by economic or legal barriers from offering equally favorable terms.

Where the tying element is credit, unavailable elsewhere on as favorable terms, the fact of acceptance of the tie-in by customers is simply not probative of economic power in the credit market.[24] Indeed, as demonstrated by the pre-

23. The contention that a jury could be allowed to infer sufficient economic power from "the number of buyers who had accepted the tying arrangement" (even when coupled with proof of loans unavailable elsewhere and a higher price for the tied product) was also rejected in *Anderson* v. *Home Style Stores, Inc.*, 381 F. Supp. 402, 406 (E.D. Pa. 1974), *aff'd w/o opinion*, 511 F.2d 1392 (3rd Cir. 1975): "While the existence of an appreciable number of buyers may properly give rise to an inference of market power in other contexts, we believe that such a standard is inapplicable here because the only source of market power claimed by plaintiffs was the unavailability elsewhere of the credit necessary to enable them to enter business."

24. As Justice White stated for the dissenting Justices: "* * * I question that buyers' acceptance of the tie-in—the simple fact that there are customers—will always suffice to prove market power in the tying product. Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller in effect is merely competing in the tied product market." (394 U.S. at 518)

ceding analysis, the three factors upon which the lower courts mistakenly relied—more favorable loan terms, a higher price for the tied product, and customer acceptance of such a tie-in—are not evidence of sufficient economic power whether considered separately or in combination.

5. *The Mandate of This Court That Other Lenders Must Be Shown to Have Been Unable to Offer Equivalent Financing Was Contravened by the Lower Courts' Disregard of the Uncontested Fact That Sources Earlier Unwilling to Risk Lower Profits Were Stimulated to Offer 100% Loans.*

In its first opinion, the Court of Appeals pointed to the undisputed fact that "soon after [Fortner] negotiated its financing terms with the [petitioners] for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis."[25] It held that this fact was relevant to "the ultimate conclusion whether the Credit Corporation had economic power in the credit market." (A 1380) In its second opinion, however, the Court of Appeals disregarded this crucial fact and Fortner's concession in its brief below (p. 38) that the trial judge, in adopting Fortner's proposed findings verbatim, "chose to ignore" it.

The uncontested fact that conventional credit sources in Louisville have been able to and have in fact granted 100% land loans since shortly after the challenged financing of

25. The witnesses, including Fortner's, testified that within less than a year, in response to such financing by others and allegedly by petitioners, conventional lending sources in Louisville were making 100% land loans and that such financing remained available from those sources thereafter. (A 421-22, 429-30, 821-23, 839-44, 847, 868-69, 1661-62; 1970 Transcript, Vol. XVI, pp. 19-20)

Fortner emphasizes the failure of the courts below to follow this Court's mandate. No single fact could be more responsive to the issue mandated by this Court—*i.e.*, whether other lenders were unable to offer the same or equally attractive terms because legal barriers or some unique cost advantage prevented them from doing so profitably. The courts below, however, have ignored this fact. If petitioners had the claimed economic power over credit when they agreed to finance Fortner's land acquisition in August, 1961, what changed circumstances explain how that power vanished in the few intervening months before July, 1962, when traditional lending institutions were concededly making 100% loans? Neither Fortner nor the courts below have answered that decisive question. Indeed, the record is devoid of evidence as to any change in circumstances which would explain how petitioners at one instant had a unique advantage precluding other lenders from offering the same financing but in the next instant lacked any such advantage.

Similarly, as noted earlier, the trial court and the Court of Appeals concluded that other lending institutions were not making 100% loans earlier simply because of their unwillingness to assume the risk of loss. The necessary implication of that finding is that other lenders were able, even at the time of petitioners' financing of Fortner, to offer equally favorable terms and merely chose not to do so to avoid the risk of lower profits. The lower courts' disregard for this fact flies full in the face of this Court's mandate. Further, because the evidence is that 100% financing by the conventional Louisville lenders was a response to such financing by other suppliers and allegedly

by petitioners, the result reached below is antithetical to the fundamental philosophy and objectives of the Sherman Act. As Justice White stated in this case:

> "A seller who is willing to take credit risks which no one else finds acceptable is simply engaging in the hard and risky competition which it is the policy of the Sherman Act to encourage. * * * [Here the credit] was evidently unavailable elsewhere simply because others were not willing to match U.S. Steel's relatively low price for acceptance of high risk." (394 U.S. at 517)

In conclusion, the record in its totality wholly fails to show any evidence that the Credit Corporation, by itself or in conjunction with U.S. Steel and the Homes Division, had any unique cost or other competitive advantage arising from legal, economic or other barriers which prevented competing lenders from profitably offering the same or equally favorable credit terms. To the contrary, the traditional credit sources in Louisville have been able to and have in fact granted 100% land loans since shortly after Fortner's financing. In that state of the record, respondent has failed to prove the "sufficient economic power" requisite to finding a *per se* tying violation, and its claim that petitioners are guilty of such a violation must be dismissed.

That respondent has failed to make the essential showing of power over credit is not surprising. If in fact the petitioners had any economic power or competitive advantage in the credit market, they would hardly have limited the Credit Corporation's financing activities just to supporting the Homes Division's modest volume of business in prefabricated houses. Rather U.S. Steel would have devoted to the business of financing more of its assets than the $1 million capital and $1 million loan it extended to the Credit Corporation and would have engaged in the financing business on a broad basis to reap the higher than normal profits which are the hallmark of the economic power or advantage essential to proof of a *per se* tying violation.

D. In Concluding That Fortner Obtained 100% Financing (Rather Than 70 to 80%), the Courts Below Applied Erroneous Legal Standards and There Is No Evidence That 70 to 80% Loans Were Unavailable Elsewhere.

The Court of Appeals held that the trial court's "determination that these loans were unique because they were 100% land acquisition and development loans is not clearly erroneous." (A 1764) The trial judge adopted respondent's proposed findings that the land financing "amounted to 100% of [Fortner's] *cost* to acquire the land in question and to develop it * * *." (A 1580, 1595, 1600) The evidence, however, is uncontradicted that the value of the land securing both transactions substantially exceeded the Credit Corporation's loan commitments (and even more so the amount actually taken by Fortner).[26] Because Mr. Fortner

26. The evidence is fully detailed at A 1459-62 and 1473-79. For example, Fortner's exhibits show that in connection with the first loan Mr. Fortner contributed an equity of 31 fully developed lots and the parties agreed that their value was $62,000 ("The 31 developed lots contributed by Fortner were valued at $62,000"). (A 993, 1230-31, 1259) Similarly, on the second loan Fortner obtained $56,688, but the 32 developed lots transferred to Fortner and which secured that loan had an FHA valuation of $70,000. (A 1122, 1218, 1239, 1241) Mr. Fortner testified that he contributed an equity and that the loan commitments were "not all of the value" in that "the lots was worth more than that, * * * the appraiser appraised 'em for more than that." (A 306, 330-31) In calculating the price

(footnote continued on next page)

made equity contributions of certain fully developed lots, assigning to respondent for acquiring the remaining lots a *cost* less than the *value* of all the lots transferred, the loans amounted at most to approximately 70 to 80% of the undisputed total value of the land which secured them.

The witnesses who testified that 100% loans were unavailable at the time assumed that the *cost* assigned to respondent in its less than arm's length dealing with Mr. Fortner was the same as the appraised or fair market value of all the lots which secured the loans. (A 221, 821, 824, 836, 868-69, 1004-05, 1635, 1637-38, 1642-43, 1653, 1658-59, 1682, 1695, 1714-16, 1720, 1724-29) The Court of Appeals erroneously concluded, "Since these witnesses were able to testify that a loan for 100% of the *cost* to acquire and develop property was unique at that time in the Louisville area, it is irrelevant that the percentage of the loan might be characterized in another way." (A 1764) Loan percentages, however, are determined solely by the *value* of the security (whether or not identical to the borrower's cost) because, as this Court noted, the possible "decline in property values * * * makes it desirable for a creditor to obtain collateral greater in *value* than the loan it secures * * *." (394 U.S. at 505)

In disregarding this fundamental principle and thus applying an incorrect legal standard, the courts below

at which he would sell the finished houses and lots to home buyers, Mr. Fortner used a value of $2,000 per lot (A 607, 1220, 1222), or $438,000 for the 219 lots. The Credit Corporation's total commitment (after deducting its service fees) on both loan agreements was only $366,333, or about 80% of the value of the land securing the transactions even if the entire development portion had been advanced (it was not).

committed reversible error, because there is no evidence that 70 or 80% loans were unavailable. Fortner has thus failed to establish that the challenged financing was uniquely favorable. That factual predicate is essential to respondent's claims even if those claims were not based upon an erroneous legal standard, *i.e.*, that uniquely favorable loan terms are evidence of economic power over credit.

II

Fortner Failed to Prove a *Prima Facie* Case of Conspiracy to Monopolize, Including the Requisite Specific Intent to Achieve Monopoly Power or the Dangerous Probability of Doing So.

As noted earlier, on the same findings from which he found a *per se* tying violation of Section 1 of the Sherman Act, the trial judge also concluded that U.S. Steel and its subsidiary, the Credit Corporation, had conspired to monopolize in violation of Section 2. (A 1603-04, 1753-54) The Court of Appeals, however, held that because "a violation of Section 1 was established, it is unnecessary to consider whether the finding of a violation of Section 2 may also be upheld." (A 1770) The record and the trial court's findings, however, fail to establish a *prima facie* case of any violation of Section 2, the findings ignore undisputed evidence which affirmatively disproves any such claim, and the trial court has applied incorrect legal standards in reaching its erroneous conclusion.[27]

27. In these circumstances, this Court is not required to remand for new or supplemental findings, because an appellate tribunal is always free, without collision with the "clearly erroneous" test of Rule 52(a), F.R.C.P., to supplement the trial court's findings by

(footnote continued on next page)

There is no basis for finding any violation of Section 2 on this record. The tie-in is the basic conduct challenged, and failure to prove the economic power over credit necessary to invoke the *per se* tying rule places a far heavier burden upon the respondent.[28] Because Fortner relies upon no other evidence than it cited as proof that the tying arrangement was a *per se* violation, petitioners submit that any claims based upon the rule-of-reason standard fall of their own weight. See *Mogul* v. *General Motors Corp.*, 391 F. Supp. 1305, 1314 (E.D. Pa. 1975) ("The contentions made in support of the monopoly claim are, in essence, restatements of the Section 1 restraint of trade claims already discussed and rejected. While it is true that evidence tending to establish a conspiracy to restrain trade might also establish an attempt or conspiracy to monopolize under Section 2, * * * since the restraint of trade claim has been found deficient as a matter of law, it cannot be used to support a claim under Section 2 of the Act").

Tying arrangements are deemed evil only when power enjoyed in the tying market is used to distort competition

resort to evidence disregarded below in deciding whether the lower court's ultimate conclusions, which are themselves not "shielded by the 'clearly erroneous' test," are based upon proper legal criteria and can be sustained. *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-142 n. 16 (1966); *Alpha Distributing Co.* v. *Jack Daniel Distillery*, 454 F.2d 442, 453 (9th Cir. 1972).

28. Thus, in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5-6 (1958), the Court emphasized that where the *per se* rule is applicable it "* * * avoids the necessity for an incredibly complicated and prolonged economic investigation * * * to determine at large whether a particular restraint has been unreasonable." Similarly, in this case, the Court stated that absent proof of a *per se* tying violation a plaintiff could prevail only by proving, "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated." (394 U.S. at 500)

on the merits in the tied product market. As Justice White noted in this case,

> "The principal evil at which the proscription of tying aims is the use of power in one market to acquire power in, or otherwise distort, a second market. This evil simply does not exist if there is no power in the first market." (394 U.S. at 519)

Thus, in *Cayne Equipment Corp.* v. *Union Asbestos & Rubber Co., Inc.*, 220 F. Supp. 784, 788-789 (S.D.N.Y. 1963), it was held that "* * * the essence of illegality in tying arrangements is the wielding of economic leverage to restrain a not insubstantial volume of commerce in the tied products. A violation of Section 2 surely requires a showing of at least as much."

Without power in the credit market, petitioners' offering of uniquely favorable credit (even if proved) is nothing more than a promotional device enhancing competition in the tied product market. The price of the tied product, houses, is for all effects and purposes reduced if the tying credit is sold at lower than prevailing prices. This Court held that, like the offer of any other tying product on favorable terms, "advantageous credit terms may be viewed as a form of price competition in the tied product * * *." It concluded that a seller can achieve that objective as long as he offers "fringe benefits over which he has no economic power." (394 U.S. at 508)

Although its evidence is limited to Louisville and to the years 1959-1961, Fortner claims that the credit extended to it and some others (as to whom there is no supporting proof) was more favorable than then available from other sources. But even if that had been proved, there is no

evidence that any other lenders, whether competitors in the housing market or those in the credit market, were unable to offer equally favorable terms. In fact, Fortner's own evidence demonstrates that even in Louisville traditional lending sources, and not merely other sellers in the housing market, were promptly stimulated by competition to grant even 100% land financing. In those circumstances, no claim can be made that petitioners used financing in unreasonable restraint of trade, let alone pursuant to any conspiracy to monopolize.

Not only is dealer financing by sellers commonplace throughout the economy, but challenges to such financing have been few and have been aimed only at the imposition of exclusive dealing as a condition to the financing. See *Hastings Mfg. Co.* v. *FTC*, 153 F.2d 253 (6th Cir. 1946); *Carnation Co.*, 60 F.T.C. 1274 (1962). In fact, while the financing here was to be used, unless repaid, only for Homes Division houses, Fortner and all others were free at the same time to use their own money or that borrowed from other lenders to buy houses from the Homes Division's competitors.

Similarly, there is no evidence that the petitioners engaged in any predatory conduct by offering credit at prices below cost, either petitioners' or any other lender's. Indeed, there is no evidence that any competitor in the housing market failed to sell a single house or that any buyer failed to purchase any houses from competitors because of petitioners' financing (with the sole possible exception of Fortner's claims that but for the financing it would not have bought petitioners' houses and that if they had consented at the time Fortner abandoned the project it would

have used the Credit Corporation's money to buy other houses when it became dissatisfied with the Homes Division's).

In view of the failure to prove economic power over the tying element, credit, this case presents essentially the same factual pattern analyzed by this Court in one of the earliest tie-in cases. In *FTC* v. *Sinclair Refining Co.*, 261 U.S. 463 (1923), the Court approved the leasing of unpatented gasoline pumps at nominal, non-remunerative rates on the condition that only the lessor's gasoline be dispensed through them. Even though the pumps were offered on uniquely favorable terms and the rates charged did not represent a reasonable return upon the gasoline supplier's investment, the Court recognized that such tie-ins serve legitimate business purposes (just as the Court stated might turn out at trial to be the case here). The Court stated:

> "No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads." (261 U.S. at 475)

In this case the trial court found that petitioners "conspired to threaten to enforce or enforce the tie-in provisions of the loan agreement by threatening foreclosure on Fortner Enterprises' property and taking certain steps to commence the foreclosure procedure." (A 1603) The record shows only that (after Fortner announced it would not continue its project, that it was without funds, and that it would sue) petitioners audited Fortner's books, demanded payment following delinquency, and asserted their

compulsory counterclaim for foreclosure after this suit was instituted by Fortner.[29]

Even if the facts were as Fortner characterizes them, however, they fail to establish a conspiracy to monopolize. The question is not whether petitioners took steps to enforce their rights under the agreement but whether that agreement, with its requirement that the funds be used only in connection with petitioners' houses, is unlawful either as a *per se* tying violation or other violation of Section 2. Unless the underlying arrangement was itself unlawful, steps to protect the petitioners' rights in connection with that agreement could not be an unreasonable restraint of trade or conspiracy to monopolize.

On the record here, the petitioners' conduct has been neither commercially unreasonable, abnormal or objectionable nor of that abusive, predatory or exclusionary character lacking any independent economic justification from which a dangerous probability of achieving monopoly or any intent to do so could be inferred. It has not been that type of conduct, differing from competition on the merits, which may reasonably be presumed to make any contribution to the creation of monopoly power.

Fortner urged as proof of the specific intent essential to proving a conspiracy to monopolize that petitioners "conspired to increase sales," that "the sole purpose of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages and that the implementation of the program constitutes

29. A 75-76, 262, 995, 1107-11, 1247-63, 1266-67, 1300-01. See also A 1468-73.

the necessary evidence of intent to monopolize * * *." The court below so concluded in precisely those words. (A 1603-04) That conclusion is contrary to the controlling legal standard for the specific intent element of a conspiracy to monopolize.

While petitioners concededly intended their financing to promote the sales of their houses, there is no evidence that their intent was "to increase [their] *share* of the market." Even if there were such evidence, however, an intent to increase one's sales or even one's minimal share of the market does not prove the kind of intent requisite to establishing a conspiracy to monopolize. Unlike monopolization, an attempt or a conspiracy to monopolize requires not just the "deliberateness" to do the acts challenged but a specific or subjective intent to accomplish the unlawful result of monopolization, *i.e.*, to destroy or control competition by obtaining monopoly power as, for example, by driving competitors out of business.[30] In *Times Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 626 (1953), this Court defined the requisite specific intent as an intent "to destroy competition or build monopoly."[31]

The courts of appeals have uniformly held that specific intent requires proof of an intent to acquire monopoly

30. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 786, 789 (1946); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 229-230 (1947); *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *United States* v. *Consolidated Laundries Corporation*, 291 F.2d 563, 573 (2d Cir. 1961); *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 306 F.2d 61, 64 (3d Cir. 1962); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431-432 (2d Cir. 1945).

31. Such intent was found by the Court in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 149-151 (1951), where the defendant's conduct "was aimed at a larger target—the complete destruction and elimination" of its sole competitor for local advertising by "bold, relentless and predatory" behavior.

power (the power to control price and exclude competition). *E.g., American Football League* v. *National Football League,* 323 F.2d 124, 132, n. 18 (4th Cir. 1963) ("* * * to find the offense of conspiracy or attempt to monopolize, there must be a specific, subjective intent to gain an illegal degree of market control"); *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656, 667 (9th Cir. 1963) (plaintiff had the burden of proving that the defendant's acts were "not 'predominantly motivated by legitimate business aims,' but instead were done in order to gain monopoly power"). See also, *Southern Blowpipe & Roofing Co.* v. *Chattanooga Gas Co.,* 360 F.2d 79, 80 (6th Cir. 1966), *cert. denied,* 393 U.S. 844 (1968). In the latter case, which had elements analogous to the allegations here, the defendant, a utility with a total monopoly in the gas market allegedly sold gas appliances at or below cost. The Sixth Circuit rejected an attempt to monopolize claim, finding that the defendant's purpose was not to monopolize the gas appliance market but rather to increase its sales in the primary gas market.

As this Court said, the question here is whether petitioners "conspired together for the purpose of * * * acquiring a monopoly in the market for prefabricated houses." (394 U.S. at 500) Even where tying arrangements are found to be *per se* violations of Section 1, without proof of specific intent to achieve monopoly they do not constitute attempts or conspiracies to monopolize. *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 567 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

The fact that no specific intent to acquire monopoly power, destroy competition or otherwise monopolize the

market for houses can be inferred here is patent from even the most cursory listing of the salient facts of record. The Homes Division had been losing and continued to lose sales while other prefab manufacturers with far larger volume increased their output as the total number of prefab houses sold by all manufacturers significantly increased. Its approximate share of prefab sales in the years in question, 1960 and 1961, fell from a minuscule 1.4% to a *de minimis* .8%. The target of 1800 units it sought with the assistance of the Credit Corporation was less than 2% of total prefab sales, and even that target was not achieved. The Homes Division's substantial losses far exceeded the Credit Corporation's modest profits. Their financing was not on predatory below-cost terms. The organization of the Credit Corporation and the adoption of its special financing program were responses to the financing activities of competing prefab manufacturers and their credit affiliates. In short, the record shows only that petitioners were attempting, however unsuccessfully, to reverse the Homes Division's deteriorating position and to compete more effectively in selling its houses by providing dealer financing.

The courts have consistently held that low market share or other proof negating the likelihood or dangerous probability of achieving monopoly is evidence that the specific intent to monopolize essential to a finding of conspiracy or attempt is lacking. Recent illustrative cases include *Hudson Valley Asbestos Corp.* v. *Tougher Heating & Plumbing Co.,* 510 F.2d 1140, 1144 (2d Cir. 1975), *cert. denied,* 421 U.S. 1011 (1975) ("Although specific intent to monopolize, and not monopoly power, is the essential element when a conspiracy to monopolize is involved, * * *

the absence of any likelihood of success is certainly some evidence on the question of whether such specific intent existed. And here the futility of any effort to monopolize either submarket as shown by the evidence * * *, coupled with the repeated denials of the defendants, amply supports the finding of the district court"); *Mullis* v. *Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974) (share of the market less than 3% and not growing not a basis for inferring any probability defendant would ever approach monopoly dimensions); *White Bag Co.* v. *International Paper Co.*, 1974-2 Trade Cases ¶75,188 (4th Cir. 1974) (9% market share and not enlarging that share no basis for finding probability of achieving monopoly).

Conclusion

For all of the above reasons, this Court should reverse the judgment below and order the entry of a judgment dismissing the complaint in its entirety.

Respectfully submitted,

MACDONALD FLINN
14 Wall Street
New York, New York 10005

ALBERT F. REUTLINGER
501 South Second Street
Louisville, Kentucky 40202

WILLIAM H. BUCHANAN
600 Grant Street
Pittsburgh, Pennsylvania 15230

Attorneys for Petitioners

Of Counsel:
WHITE & CASE
NORMAN YOERG, JR.
MIDDLETON, REUTLINGER & BAIRD